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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10 (HONORABLE JEFFREY T. MILLER)

11 UNITED STATES OF AMERICA,)

CASE NO. 07CR2872-JM

12 Plaintiff,)

DATE: April 11, 2008

TIME: 11:00 a.m.

13 v.)

14 **JUAN HERON-SALINAS,**)

**RESPONSE TO GOVERNMENT
SUBMISSION RE: DEFENDANT'S MOTION
TO DISMISS INDICTMENT DUE TO
INVALID DEPORTATION**

15 Defendant.)

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17 On March 7, 2008, this Court asked counsel to submit citations to any out-of-circuit authority
18 regarding the issue of whether a conviction under Cal. Penal Code § 245 (assault with a deadly weapon) is
19 a crime of violence.

20 In its submission, the government cites to *United States v. Sanchez-Ruedas*, 452 F.3d 409 (5th Cir.
21 2006). In that case, however, the Fifth Circuit held that a conviction under Cal. Penal Code § 245 is a crime
22 of violence under the Sentencing Guidelines because it is substantially similar to the enumerated offense of
23 “aggravated assault” in U.S.S.G. § 2L1.2, cmt. n.1(B)(iii). *See id.* at 412. That holding, however, is not
24 relevant to whether § 245 is a crime of violence under 18 U.S.C. § 16(b), the issue in the instant motion,
25 because the § 16(b) definition does not include the enumerated offense of aggravated assault. Notably, the
26 court in *Sanchez-Ruedas* did not reach the question of whether § 245 is a crime of violence under the “use of
27 physical force” definition in the residual clause of the Guidelines. In a subsequent case in the same circuit,
28 *United States v. Robles-Enriquez*, 194 Fed. Appx. 189, 2006 WL 2347324 at *1 (5th Cir. Aug. 11, 2006), the

1 government conceded on appeal that a California conviction for assault with a deadly weapon does not
 2 qualify as a crime of violence under the “use of physical force” theory.

3 The government also cites to the unpublished opinion in *Vazquez-Zamora v. Mukasey*, 2008 WL
 4 467685 (9th Cir. Feb. 20, 2008). *Vazquez-Zamora*, an unpublished opinion, relied solely on *Ocampo-Duran*
 5 v. *Ashcroft*, 254 F.3d 1133, 1134-35 (9th Cir. 2001), to find that § 245 is a crime of violence for immigration
 6 purposes. *Ocampo-Duran*, however, did not address whether § 245 is a crime of violence, but only whether
 7 the alien in that case was convicted of an aggravated felony. The term “crime of violence” is nowhere found
 8 in that opinion. Moreover, the issue in *Ocampo-Duran* was whether the government had provided sufficient
 9 evidence of the conviction, not whether the conviction met the statutory definition of crime of violence under
 10 a categorical or modified categorical approach. Accordingly, these authorities are not relevant to the instant
 11 motion.

12 Finally, the government has submitted the appellate briefs filed in the pending appeal of *United States*
 13 v. *Ramon Alberto Arana-Esquivel*, U.S.C.A. No. 07-50130, U.S.D.C. S.D. Cal. No. 06CR1359-BTM. In
 14 addition, whether § 245 is a crime of violence under the Sentencing Guidelines is also an issue in the
 15 following appeals currently pending before the Ninth Circuit, with substantially similar briefing: *United States*
 16 v. *Gerardo Grajeda*, U.S.C.A. No. 07-50387, U.S.D.C. S.D. Cal. No. 07CR0214-H, *United States v. Luis*
 17 *Estrada Eliverio*, U.S.C.A. No. 07-50191, U.S.D.C. S.D. Cal. No. 05CR1593-BTM, and *United States v.*
 18 *Ismael Amador-Beltran*, U.S.C.A. No. 07-10041, U.S.D.C. D. Ariz. No. 06CR1440-FRZ.

19 Respectfully submitted,

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 21 DATED: March 21, 2008

/s/ Jennifer L. Coon

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CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of her information and belief, and that a copy of the foregoing document has been served this day upon:

Courtesy Copy Court

Copy Assistant U.S. Attorney via ECF Notice of Electronic Filing

Dated: March 21, 2008

/s/ Jennifer L. Coon
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